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THE HON. SAMUEL J. STEINER
JANUARY 31, 2002
9:30 a.m.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

FILED
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CLERK
U.S. BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

In re:)
)
DEBORAH HELEN BIRRANE,)
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)
)
Debtor.)
)
DEBORAH HELEN BIRRANE,)
)
)
Plaintiff,)
)
vs.)
)
MELON FINANCIAL CORPORATION,)
PENNSYLVANIA HIGHER EDUCATION)
ASSISTANCE AGENCY AND STUDENT)
LOAN SERVICING CENTER, a)
Division of P.H.E.A.A.,)
)
Defendants.)

No. 01-16399
Chapter 7
ADV. PROC. A01-01413
TRIAL BRIEF

COMES NOW THE Debtor and submits the following Memorandum for
Trial.

1. FACTS

This is a student loan case. The Debtor is a 36 year old
single woman. She is a choreographer and children's dance teacher.

The Debtor graduated from Pennsylvania State University in
December of 1989 with a Bachelor's degree in social work and a
minor in dance. She obtained her Masters degree in dance from the

TRIAL BRIEF

- 1 -

ORIGINAL

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University of Arizona in 1995.

1 She lived in Philadelphia for several years and supported
2 herself as a pre-school teacher while trying to further her dance
3 and teaching career. She moved to Seattle in 1998 and started a
4 dance company, Deborah Birrane with Unexpected Company. The dance
5 company is a non-profit organization. The company specializes in
6 modern dance presentations.
7
8

9 To support herself, the Debtor teaches dance to children at
10 Pacific Northwest Ballet and the Creative Dance Center. She also
11 holds several other part time instructional positions.
12

13 To finance her education, the Debtor obtained several student
14 loans which were consolidated as a Federal Family Education Loan
15 Program loan. The present balance of the loan is approximately
16 \$50,000.00.
17
18

19 Over the years, the Debtor has attempted, as best she could,
20 to make payments on her student loans. She has made approximately
21 27 payments on the loans.
22

23 In 1999 the Debtor earned approximately \$14,000.00. She also
24 got about \$3,800.00 in unemployment.
25

26 In 2000, her adjusted gross income was approximately
27 \$17,000.00. In 2001, her income will be approximately \$22,000.00.
28 The Debtor will testify that there is no particular reason to
29 believe that her income will increase significantly in the future.
30

31 The Debtor lives modestly. Her meager earnings are consumed
32 with the bare necessities of life. Because of the nature of her

1 profession, and her inability to obtain medical insurance, her
2 medical expenses are relatively high. She will testify that in the
3 past she was only able to maintain a modest standard of living as
4 a result of the use of credit cards and subsidies from her family.

5 In order to repay the student loans under a Stafford/Ford
6 consolidation loan, the Debtor would have to pay \$613.00 per month
7 for the next ten years or \$395.00 per month for the next twenty
8 five years.
9

10 If the Debtor were able to obtain an income contingent loan,
11 her initial payments would be approximately \$140.00 per month until
12 she is sixty years old. Under the income contingent program all of
13 her payments would go to interest. None will be applied to
14 principal.
15
16

17 2. LEGAL AUTHORITIES

18 As the Court is well aware, the law in this area is decidedly
19 murky.
20

21 11 U.S.C. § 528(a)(8)(B) states that student loans are
22 discharged if "excepting such debts from discharge... will impose
23 an undue hardship on the Debtor and the Debtor's dependents."
24

25 Different tests are established in determining whether a
26 Debtor is entitled to a hardship discharge of student loans. The
27 Ninth Circuit has adopted the test found in Brunner v. New York
28 State Higher Education Services Corp., 831 F.2d 395(2nd Cir.
29 1987). In Re: Pena, 155 F.3rd 1108 (9th Cir. 1998). The Brunner
30 test has three elements:
31
32

1 (1) That the Debtor cannot maintain, based
2 on current income and expenses, a "minimal"
3 standard of living for herself and her
4 dependents if forced to repay the loans;

5 (2) That additional circumstances exist
6 indicating that this state of affairs is
7 likely to persist for a significant portion
8 of the repayment period of the student
9 loans;

10 (3) That the Debtor has made good faith
11 efforts to repay the loans. Brunner, 832
12 F.2nd @ 396.

13 The Debtor will easily be able to show that she meets each of
14 the three tests found in Brunner.

15 Under the best possible circumstances, full repayment of the
16 loan would require that the Debtor make payments somewhere between
17 \$350.00 and \$520.00 per month. Such payments would not even allow
18 her to maintain her current spartan lifestyle, let alone a "minimal"
19 standard of living.

20 The Debtor will testify that absent some extra-ordinary
21 stroke of luck, she is earning as much as can reasonably be
22 expected in her chosen profession.

23 The records of the student loan agencies will show that the
24 Debtor has made serious efforts over the past years to repay the
25 loan. However, those efforts were largely as a result of her
26 ability to use credit cards for living expenses and the largess of
27 her parents.
28

29 Thus, the major question faced by this Court will be whether
30 or not the Court should fashion some sort of equitable resolution
31 to partially discharge the student loan debt.
32

1 Various Courts have reached different answers to this
2 question. There appears to be no controlling authority in this
3 Circuit.

4 The Ninth Circuit BAP has clearly held that partial discharge
5 of student loans is impermissible, discharge being an all or
6 nothing proposition. In Re: Taylor, 223 BR 747(9th Cir. BAP 1998).
7 In Taylor, the Panel relied on the plain language of §523(a)(8)
8 which it held to be clear and unambiguous in prohibiting a partial
9 discharge of student loans.
10

11
12 The Taylor decision has been modestly criticized in Graves v
13 Myrvang, 232 F.3rd 1116(9th Cir. 2000).
14

15 The Graves Court agreed with the reasoning of the Sixth
16 Circuit found in Tennessee Student Assistance Corp. v. Hornsby,
17 144 F.3rd 433(6th Cir. 1998). Since the Graves case was a
18 523(a)(15) decision, it is certainly not binding authority in this
19 case. However, Graves can also be distinguished both on facts and
20 law.
21

22 In Graves, the trial Court found that the Debtor did have the
23 ability to repay a divorce obligation but discharged the amounts
24 which could not be repaid within five years. The Court reasoned
25 that it should apply the maximum time period under Chapter 13 to
26 determine whether or not the debt could be repaid. Under those
27 circumstances the Court ordered the Debtor to repay \$102,000.00 of
28 a \$120,000.00 debt to his ex-wife over five years with the balance
29 of the debt to be discharged. The Court thus concluded that the
30
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1 debtor had the ability to repay the debt over a longer period of
2 time but that it was constrained by the five year limitation of
3 Chapter 13. The Court therefore determined that a partial
4 discharge of the portion of the debt which could not be repaid
5 within five years was appropriate.
6

7 In upholding the authority of the Bankruptcy Court to grant
8 a partial discharge under 523(a)(15), the 9th Circuit cited with
9 approval the following language found in Hornsby:
10

11 Addressing the context of the student loan
12 discharge under §523(a)(8), the Court
13 reasoned that "where undue hardship does not
14 exist, but where facts and circumstances
15 require intervention in the financial burden
16 on the Debtor, an all or nothing treatment
thwarts the purpose of the Bankruptcy Act."
In Re: Hornsby, 144 F.3rd @ 439, cited at
232 F.3rd 1123.

17 Inherent in the Hornsby rational is the requirement that the
18 Court must first find that undue hardship does not exist before it
19 can exercise equity in allowing a partial discharge. The Myrvang
20 Court must have first found that repayment of the debt would not
21 result in undue hardship. The holding in Myrvang should be limited
22 to just those circumstances: If a portion of the loan can be repaid
23 in a reasonable time without undue hardship, the Court may
24 partially discharge the balance of the loan.
25

26 However, in this case, it is impossible for the Debtor to
27 repay even a portion of the loan. Interest payments on \$50,000.00
28 at 9% per annum alone would be \$375.00 per month. Under the best
29 of circumstances, the Debtor could not even make interest payments
30
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1 on the loan and would never repay any portion of the loan
2 principal. Any lower payment would result in a negative
3 amortization of the loan leaving the Debtor making payments until
4 she dies with no reduction in the loan amount. That being the
5 case, the Court should discharge the entire balance of the student
6 loans.
7

8 Dated this 28 day of January, 2002.
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12 SNODGRASS & WARREN, INC., P.S.

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14 By: 
15 MARTIN E. SNODGRASS WSBA NO. 6961
16 ATTORNEY FOR DEBTOR
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